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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

URIEL ORTA,

Defendant and Appellant.

B202935

(Los Angeles County
Super. Ct. No. BA275162-02)

APPEAL from the judgment of the Superior Court of Los Angeles County.

Bob S. Bowers, Jr., Judge. Affirmed.

Donald R. Tickle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Uriel Orta appeals from the judgment entered after a jury convicted him of first degree felony murder, contending the jury should have been instructed to consider theories of second degree murder and voluntary manslaughter. We hold that such instructions were not warranted by the evidence, and, alternatively, that the failure to give them was harmless error. Accordingly, and because other asserted grounds for reversal are without merit, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Shortly before 1:30 a.m. on November 14, 2004, Enrique Rivera was robbed and beaten to death as he walked to his house near Trinity and 35th Streets. Antonio Paredes, who lived nearby, saw appellant Uriel Orta, who was armed with a golf club, Jasiel Cortes, who was armed with a baseball bat, and one other man run together until they disappeared from view, then heard what sounded like something being hit repeatedly and continuously. Paredes went to investigate and found Rivera on the ground, moaning and bleeding profusely. An autopsy showed that the cause of death was blunt force trauma to the head. Rivera took four blows to the head, along with blows to his hand, chest, and back.

Rivera's death was set in motion by a chain of events that began with the beating of Herman Oliva on November 12, 2004. Oliva was a friend of Orta and a fellow member of the 213 tagging crew. Oliva's attackers were two men known as Zavala and Marshall. Paredes had also witnessed the attack on Oliva and saw Cortes at the scene. At around 1 p.m. on November 13, 2004, Paredes saw Orta, Cortes, and several other men walking down 35th Street. Orta held a golf club whose head had been sharpened. Cortes held a baseball bat. The group went to Zavala's house and shouted insults, apparently to provoke a fight. Zavala did not come out, but Marshall did. There was a stand-off, and no fight took place. At around 1:20 a.m. on November 14, Paredes was drawn outside by the sound of someone banging on trash cans, which turned out to be caused by the same group as before. That is when he saw Cortes, Orta, and the others head down the street to the fatal encounter with Rivera.

Francisco Olvera was part of the Orta-Cortes group and was armed with a crow bar. Testifying under a grant of immunity, Olvera said that as the group walked beyond Paredes's house toward 35th and Trinity, he was on the sidewalk but Orta and Cortes walked together down the middle of the street. Olvera saw victim Rivera walk past. When Olvera turned around to check on the others, he saw that Orta was standing in front of Rivera, while Cortes was behind Rivera. Rivera held a nylon bag that his brother testified was most likely the "gig bag" containing Rivera's drum sticks and a portable television. Olvera saw that Cortes was saying something to Rivera, and that Rivera shook his head as if to indicate "no." Cortes then struck Rivera twice with the baseball bat, driving Rivera to his knees. According to Olvera, appellant Orta then struck Rivera three times around the head.

Olvera testified that Cortes picked up Rivera's bag and ran off, along with him and Orta. On the way, they broke into several cars. Although Olvera did not see Orta take anything from the cars, Orta was stopped by the police soon after and was found with a car stereo, a speaker, and several CD's. Orta was detained but was not arrested at that time. Eventually, Cortes stashed Rivera's bag in an apartment somewhere.

When Orta was finally questioned by the police in connection with Rivera's death, Orta admitted beating Rivera. Orta told the police that he had not been with Cortes at first, but had instead been standing with Olvera away from where Cortes confronted Rivera. Orta said Cortes was "trying to rob" Rivera. Orta claimed he struck Rivera just once. The police asked Orta if he hit Rivera "just to hit him?" Orta replied, "Huh?" One officer said, "You just hit him to hit him -- ." Another officer interjected, asking, "Just got caught up? Just got caught up in the moment or what?" Orta replied, "Yeah."

In 2006, a jury found Orta guilty of first degree felony murder, but the trial court granted a new trial because the prosecution had elected to proceed on that theory too late in the trial. For the retrial, an amended information was filed that charged Orta with first degree murder solely on a felony murder theory, on the basis that he aided and abetted the robbery of Rivera. The case was retried on that basis. Orta was again convicted of

first degree murder.¹ On appeal, he contends: (1) the trial court erred by denying his request to instruct the jury on second degree murder and voluntary manslaughter; (2) the trial court erred by excluding expert testimony concerning his ability to form the intent to rob or to harbor malice; (3) the trial court erred by admitting evidence of the post-killing car burglaries; and (4) the prosecutor committed misconduct by repeatedly telling the jury that Orta and his tagging crew were out to terrorize Rivera's neighborhood.

DISCUSSION

1. Failure to Instruct on Lesser Offenses Was Not Error or in the Alternative Was Harmless Error

When a killing occurs during the course of certain enumerated felonies, including robbery, a first degree felony murder is committed, regardless of whether the defendant acted with malice. (Pen. Code, § 189; *People v. Wilson* (2008) 43 Cal.4th 1, 17.) If the facts point indisputably to felony murder based on a crime enumerated in Penal Code section 189, the defendant can be guilty of only felony murder and the court may instruct the jury on that theory only. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909.)

Because the amended information filed for the retrial alleged guilt under only a felony murder theory, the trial court refused Orta's request to instruct the jury on the lesser offenses of second degree murder and voluntary manslaughter.² Orta contends this was error because there was sufficient evidence for the jury to conclude that he did not intend to take part in Cortes's robbery of Rivera. If he did not intend to aid and abet the robbery of Rivera, then he was not guilty of robbery, thereby negating felony murder liability. He bases this on the portion of his police statement where he agreed with the interrogating officers that he became "caught up in the moment."

¹ Cortes was separately tried and convicted of second degree murder on a traditional theory of an intentional killing done with malice, a judgment that we affirmed. (*People v. Cortes* (Mar. 25, 2008, B194418) [nonpub. opn.].)

² Orta contends incorrectly that the amended information also alleged murder under traditional malice theories.

We do not view the evidence as charitably. Orta told the police that he knew Cortes was trying to rob Rivera. Orta claimed he was on the other side of the street with Olvera, and that after seeing Cortes strike Rivera, he walked over and struck a blow of his own. The following exchange then took place between Orta and the two detectives who were interviewing him:

“[Detective 1]: So then you hit him just to hit him?”

“[Orta]: Huh?”

“[Detective 1]: You just hit him just to hit him --”

“[Detective 2]: Just got caught up. Just got caught up in the moment or what?”

“[Orta]: Yeah.”

Orta never responded to the statement that he hit Rivera “just to hit him.” Instead, he agreed with Detective 2 that he got “caught up in the moment or what.” If Orta meant to agree as to “the moment,” that moment was the ongoing robbery of Rivera by Cortes. Orta’s statement does not differentiate between the possibility that he went over to assist the robbery and the possibility that he simply went over to join in a beating. Instead, it is speculative at best and therefore is not evidence of, and does not raise an inference of, the latter possibility. Of course, if Orta was agreeing with the “or what” portion of Detective 2’s inquiry, it is impossible to tell what he might have meant by his affirmative response.

Even if we considered this statement as slight evidence that Orta did not intend to rob Rivera, but simply decided to engage in an opportunistic assault, we affirm on the alternative ground of harmless error. Assuming for discussion’s sake that the trial court should have instructed the jury on second degree murder and voluntary manslaughter, we will reverse only if it is reasonably probable the jury would have returned a different verdict if properly instructed. (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868.) In making this determination, we consider whether the evidence supporting the judgment is so relatively strong, and the evidence supporting a different outcome is so relatively weak, that a different result was not reasonably probable. (*Id.* at p. 870.) As set forth below, we hold that the evidence supporting a finding that Orta intended to take part in the robbery of Rivera was so strong that any error was harmless.

In order to negate his participation in the robbery of Rivera, Orta had to convince the jury of the version of events he gave in his police statement: that he was standing with Olvera some distance away while Cortes approached Rivera by himself and administered the initial blows, and that the moment he was caught up in involved nothing more than the chance to take part in that beating. This is squarely contradicted by the eyewitness testimony of Paredes, who saw Cortes, Orta, and another man running together down the middle of the street right before Paredes heard the sounds of something being repeatedly hit. It is also contradicted by Olvera, who said he was standing by himself, and that it was Cortes and Orta together who confronted Rivera. According to Olvera, Cortes stood behind Rivera, trying to grab his bag, while Orta stood in front of him, armed with his golf club. When Rivera did not release the bag, Cortes hit Rivera with a baseball bat, driving him to his knees. Orta then joined in, delivering two or three blows to Rivera's head. Orta also told the police that he knew Cortes was trying to rob Rivera. Standing alone, this is powerful evidence that Orta and Cortes were working in concert to rob Rivera.

Our conclusion is supplemented by other evidence of their conduct both before and after the robbery. There was no dispute that Orta and Cortes had been working together earlier in their effort to locate and assault Marshall and Zavala, and were still banding together when they encountered Rivera. After their encounter with Rivera, Cortes and Orta continued working together as they broke into several cars and stole car stereo gear.³ Taken as a whole, it shows that when their plans to attack Zavala and Marshall failed, Orta and Cortes continued working together, this time by stealing property from Rivera and then from parked cars.

Finally, Orta argued to the jury that he did not intend to rob Rivera and simply joined in what he saw as an ongoing beating. The jury expressly rejected this notion and found that Orta in fact intended to aid and abet the robbery of Rivera. On this record, we

³ The propriety of admitting the latter evidence is also at issue on appeal. As discussed in section 3, *post*, we hold that the evidence was relevant for just this purpose and was therefore admissible.

therefore hold that a finding Orta did not intend to rob Rivera was most unlikely even if the jury had been instructed to consider second degree murder and manslaughter. Accordingly, we conclude that even if the court erred by failing to give those instructions, its error was harmless.

Orta also contends that the failure to instruct on lesser offenses violated his federal constitutional rights to due process, counsel, and to present a complete defense. As to the latter, the fact that the jury found against him on this issue based on the very evidence and jury argument he claims supported such instructions, means the issue was not removed from the jury's consideration and that any error was harmless. (*People v. Elliot* (2005) 37 Cal.4th 453, 475.) As for the due process claim, that right is implicated by the failure to instruct on lesser offenses only in death penalty cases. (*People v. Rogers, supra*, 39 Cal.4th at p. 868, fn. 16.) As for the right to counsel, we are aware of no authority for the proposition that a refusal to instruct on requested lesser offenses amounts to a deprivation of that right. Regardless, we hold that the evidence of Orta's participation in the robbery was so strong that any error was harmless even under the federal beyond a reasonable doubt standard.

2. *Exclusion of Mental Condition Evidence*

In connection with his efforts to try the case on the lesser offense theories of second degree murder and manslaughter, Orta made a pretrial motion to allow the medical expert testimony of a neuropsychiatrist concerning Orta's inability to harbor malice in connection with Rivera's death. According to the motion, Dr. David T. Feinberg would testify that the following circumstances or conditions "impeded or interfered with defendant's formation of the mental state of express or implied malice." These were: the biological immaturity of a 15-year-old and the effect of a partially developed pre-frontal cortex; arrested moral and social development from troubles in school and early use of alcohol and marijuana; the absence of male role models; and depressive thought processes that would have impaired his ability to perceive and respond to issues of risk and danger to others. The trial court excluded the evidence

because the case was to be tried solely on the theory of felony murder, making the issue of malice irrelevant. Orta contends this was error.

To the extent we held in section 1 (at pp. 4-7, *ante*) that it was proper to limit the jury to the felony murder theory because there was no evidence to support instructions on lesser offenses, we also hold that the malice evidence was not relevant and was therefore properly excluded. To the extent we held in the alternative that any error in not instructing the jury on lesser offenses was harmless, we similarly conclude that admitting evidence casting doubt on Orta's ability to harbor malice would not have resulted in a different outcome because, under any applicable standard of harmless error, the jury would not have found that Orta did not intend to take part in a robbery.

Orta also contends that he offered Feinberg's testimony on the issue of his ability to form the intent to rob. He makes this contention (1) in part by ignoring the express language of his written motion, which made no mention of robbery and was limited instead to malice, and (2) in part by misconstruing portions of his trial counsel's several arguments to the trial court in connection with the Feinberg testimony motion. Although defense counsel mentioned robbery and the intent to rob during his arguments, those comments were all made in the context of his attempt to have the jury instructed on second degree murder and manslaughter. At no time did defense counsel assert that Feinberg would testify that certain factors might have prevented Orta from forming the intent to rob and, in fact, when asked by the trial court, conceded that he had "not presented anything to the prosecution" about Orta's "specific intent to commit robbery." As a result, we hold that any issue with regard to the use of Feinberg's testimony on the question of Orta's intent to rob was not raised below and was therefore waived. (Evid. Code, § 354, subd. (a).)

3. *Evidence of the Auto Break-ins Was Admissible*

Orta contends that evidence of the car break-ins and car stereo thefts immediately after Rivera was attacked was inadmissible under Evidence Code section 1101, which prohibits the admission of character evidence generally (Evid. Code, § 1101, subd. (a)),

but allows evidence of other crimes when relevant to prove facts such as motive, opportunity, intent, plan, or knowledge. (Evid. Code, § 1101, subd. (b).) Because the car break-ins were dissimilar from the Rivera robbery and assault as to both the nature of the acts and the requisite intent, Orta contends the evidence should have been excluded. He also contends the evidence should have been excluded under Evidence Code section 352 because it was more prejudicial than probative. We disagree.

Evidence that a defendant committed other crimes than those charged is admissible when “it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.” [Citation.]’ [Citation.]” We review for abuse of discretion a trial court’s ruling on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.” (*People v. Butler* (2005) 127 Cal.App.4th 49, 60.)

Although the crimes were dissimilar, they showed that Orta and Cortes were continuing to act in concert after their plan to attack Zavala and Marshall was thwarted, this time by engaging in acts of theft, whether by force from a person or by breaking into parked cars. As such, it was highly relevant to the issue of Orta’s intent to steal, especially when done in concert with Cortes. Given this, and the relatively minor nature of the post-robbery/murder offenses, we hold that the evidence was proper under

Evidence Code section 1101 and was not more prejudicial than probative under Evidence Code section 352.⁴

4. *The Prosecutor Did Not Commit Misconduct*

Over repeated defense objections, the prosecutor referred several times during closing argument to Cortes, Orta, and the 213 tagging crew as bent on “terrorizing” the neighborhood where Rivera was killed. The trial court instructed the jury that counsel’s arguments were not evidence and reminded the jurors they were the ultimate finders of fact as to what happened. Eventually, however, the court told the prosecutor to stop because the repeated references were becoming inflammatory. From then on, the prosecutor used the term “victimizing” instead. Orta contends the “terrorizing” references were highly inflammatory, especially in our post 9/11 world, and that the prosecutor therefore committed misconduct by her use of that term.

We view these statements as the type of rhetorical hyperbole frequently used by counsel. It was based on a reasonable inference from the evidence -- the day-long presence of Orta, Cortes, and their companions as they roamed the neighborhood, first looking to attack Zavala and Marshall, then walking the streets in the middle of the night banging on trash cans, and finally, turning their attention to robbery, murder and theft. No reasonable jury was likely to conflate this with the terrorist acts of 9/11, the tactic was not reprehensible, and it did not infect the trial with such unfairness that due process was violated. We therefore hold that no misconduct occurred. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

5. *Cumulative Error Claim*

Orta contends that all the errors he asserted require reversal because of their cumulative prejudicial effect. We have held that, in the alternative only, just one

⁴ Orta also contends that admission of the evidence violated his constitutional due process rights. The basis of this argument is the irrelevance of the evidence. Because the evidence was relevant, we need not reach this issue.

harmless error occurred in failing to instruct the jury on lesser offenses. Accordingly, there are no errors to accumulate.

DISPOSITION

For the reasons set forth above, the judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.